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August 4, 2011

Supreme Court Clerk
Post Office Box 30052
Lansing, MI 48909

Re: ADM File No.: 2010-13

Dear Clerk:

I am writing to express my opposition to the proposed amendments to MCR 6.001. This amendment would cut off the right to defense discovery prior to a preliminary examination in a criminal case.

The fundamental problem with this rule, as I see it, is that it ignores the evidence preservation function of a preliminary examination. Testimony at a preliminary examination may be read in at trial if a witness is not available and a similar motive exists to develop the testimony at the prior hearing. [1] If defense counsel is cut off from any discovery prior to the preliminary examination, I seriously question whether this testimony would be admissible before a jury. Moreover there would be questions as to whether or not the defense would then be permitted to impeach the prior testimony with materials later learned.

Courts frequently state that the purpose of a preliminary examination is to ensure that there is sufficient evident to present the matter to a jury. In this regard a preliminary examination functions in a criminal case much like a summary disposition motion functions in a civil case. It allows the party to assert that the government or opposing counsel lacks sufficient evidence to create a factual dispute. In civil summary judgment cases this motion is filed at the completion of extensive discovery. Here the proposal would so front load the preliminary examination in the process that not even the most basic of discovery would be available for counsel.

This rule is unyielding in its scope and doesn't even have an exclusion to allow a judge to permit this discovery on a showing of good cause. The staff

[1] MRE 804(5).

commentary states that the purpose of the proposal is to "clarify" that discovery is not allowed under Subsection B in the district court prior to the preliminary examination, however this does not clarify anything. It is directly contrary to Michigan case law. The Michigan Court of Appeals in a case entitled I*n re Bay Prosecutor* ruled that there was a right to discovery prior to the preliminary examination. [2] There is no case law change that I am aware of that has changed this proposition. This proposal is not a "clarification," it is a repudiation of Michigan law.'

There is also a pragmatic concern associated with permitting developed preliminary examinations from taking place. Allowing both sides to see a reasonable glimpse of the other side's case can create more reasonable expectations. A criminal defendant who sees that the state holds a very substantial case may be more inclined to agree to a negotiated result. Similarly, the State who sees that there star witness may be vulnerable to a serious defense challenge may decide to work harder on the settlement option or to tighten up their case.

A preliminary examination also functions as a tool to shape pretrial motion practice at the circuit level. It provides counsel a deep enough glance into the case so that a reasonable prosecutor or defense practitioner can anticipate many of the issues that could arise at trial and work to sort those matters out in a timely fashion.

It is also worth noting that the People also benefit from a thorough preliminary examination. If a week case goes to trial it may want up with a dismissal order which is appellate proof because of double jeopardy. If a debatable case gets dismissed at the preliminary examination stage, the State has a full range of appellate options.

Lastly, I do not believe that the current practice seriously burdens the prosecution or the police. In my experience, prosecutors have a copy of the police report and other investigative documents available for their use at the preliminary examination. The police are going to have to copy these documents for the defense in just a few weeks anyway; I simply do not understand how it will significantly burden them to make a defense copy of the reports prior to the examination.

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[2] *Bay Cnty Prosecutor v Bay Cnty Dist Judge*, 109 Mich App 476; 311 NW2d 399 (1981).

For these reasons I urge the court to reject the proposed amendments to MCR 6.001.

Yours very truly,

/s/Stuart G. Friedman

Stuart G. Friedman